



CALIFORNIA STATE BOARD OF EDUCATION

MAY 2004 AGENDA

SUBJECT

Special Education: Approve amendments to proposed Title 5 Regulations regarding withholding funds

☒ Action

☒ Information

☐ Public Hearing

RECOMMENDATION

Amend proposed regulations 3088.1 and 3088.2 regarding withholding funds to enforce special education compliance and direct staff to send out the proposed amendment for a 15-day comment period.

SUMMARY OF PREVIOUS STATE BOARD OF EDUCATION DISCUSSION AND ACTION

The State Board of Education at the January 2004 meeting approved the commencement of the rule making process for the proposed regulations. Staff was directed to conduct a public hearing that was held on March 8, 2004 at 8:00 a.m. A summary of the public comments received by March 8, 2004 and written responses to those comments is presented in the Final Statement of Reasons. Changes are proposed to the regulations. If the recommended changes are approved by the State Board, a 15-Day Notice of Modifications to the Text of Proposed Regulations must be sent to persons who testified at the public hearing or submitted written comments during the 45-Day public comment period.

SUMMARY OF KEY ISSUES

20 USC Section 1413 requires, among other things, that state education agencies monitor local education agencies to assure compliance with special education laws. 34 CFR 300.197 and *Education Code* Section 56845 (a) and (b) authorize the Superintendent to withhold state and federal funds from a local education agency after reasonable notice and opportunity for a hearing if the superintendent finds the agency out of compliance with special education laws.

The proposed regulations are developed in response to the U.S. Department of Education Office of Special Education Policy (OSEP) expectation that state education agencies have a full continuum of enforcement options to compel compliance with special education laws.

Section 3088.1 of the proposed regulations specifies the required contents of a hearing notice and the timelines for conducting the hearing prior to making a decision whether to withhold funds. Section 3088.2 specifies funds shall be withheld if the hearing officer determines that a preponderance of the evidence supports the Department's findings of

noncompliance and withholding of funds is appropriate in the particular circumstance. This section also stipulates that the superintendent may apportion state and federal funds previously withheld from the local education agency when it is determined that substantial progress toward compliance with special education laws has been made.

FISCAL ANALYSIS (AS APPROPRIATE)

The original regulation was determined to have no adverse fiscal impact against the state. The Economic and Fiscal Impact Statement on the modified regulation is pending review and will be submitted as a Last Minute Memorandum.

ATTACHMENT

[Attachment 1](#): 15-Day Notice of Modifications to Text of Proposed Regulations (1 Page)

[Attachment 2](#): Final Statement of Reasons (2 Pages)

[Attachment 3](#): Proposed Regulations 3088.1 and 3088.2 (5 Pages)

The fiscal analysis is pending review and will be provided as a Last Minute Memorandum.

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, Governor

CALIFORNIA STATE BOARD OF EDUCATION

1430 N Street, Room 5111
Sacramento, CA 95814



May 19, 2004

**15-DAY NOTICE OF MODIFICATIONS TO TEXT OF
PROPOSED REGULATIONS
Withholding Funds – Special Education Mandates**

Pursuant to the requirements of Government Code section 11346.8(c), and Section 44 of Title 1 of the California Code of Regulations, the State Board of Education (State Board) is providing notice of changes made to the above-entitled proposed regulation which was the subject of a regulatory hearing on March 8, 2004. These changes are in response to comments received regarding the proposed regulation.

If you have any comments regarding the proposed changes that are the topic of this 15-Day Notice, the State Board will accept written comments between **May 19, 2004 and June 2, 2004**, inclusive. All written comments must be submitted to the Regulations Coordinator via facsimile at (916) 319-0155; or via email at dstrain@cde.ca.gov, or mailed to the following address no later than **5:00 p.m. on June 2, 2004**, and addressed to:

Debra Strain, Regulations Coordinator
California Department of Education
LEGAL DIVISION
1430 N Street, Suite 5319
Sacramento, California 95814
Telephone: (916) 319-0860

All written comments received by **5:00 p.m. on June 2, 2004**, which pertain to the indicated changes will be reviewed and responded to by California Department of Education staff as part of the compilation of the rulemaking file. Please limit your comments to the modifications to the text.

The State Board has illustrated changes to the original text in the following manner: regulation language originally proposed is underlined. The 15-Day Notice illustrates deletions from the language originally proposed using a "~~strikeout~~"; and additions to the language originally proposed using a "**bold underline**."

FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS

SECTION 3088.1

The initial proposed regulation did not allow local educational agencies (LEAs) to have a full evidentiary hearing on all findings of noncompliance with the laws related to special education before funds could be withheld by the Department of Education to encourage compliance. The initial regulations, rather, allowed for a hearing before withholding funds, but only on the issues of what the LEA had done to comply or the mitigating circumstances that prevented full compliance. The revised regulation now expands the scope of the hearing and allows an LEA to present a full response to the underlying findings of noncompliance made by the Department. The regulation also prescribes procedures for providing LEAs with notice of the reasons for withholding, an opportunity to review the full record, a hearing before a hearing officer, and a final written decision prior to the actual withholding of funds from the LEA.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF JANUARY 23, 2004 THROUGH MARCH 8, 2004.

Comment: Kevin Reed, Acting General Counsel for the Los Angeles Unified School District, and Ronald Wenkart, General Counsel for the Orange County Office of Education, each submitted substantial legal arguments why funds should not be withheld unless an LEA has been afforded the opportunity for a full evidentiary hearing on the underlying findings of noncompliance made by the Department of Education. Those arguments were based upon both federal and state statutes and case law interpreting a similar hearing requirement applied to the cutoff of funds to a State by the U.S. Department of Education. Those comments were supported in more summary fashion by five separate school districts and the Sonoma County Office of Education. In addition, the same comments were made by the California School Boards Association, the Coalition for Adequate Funding for Special Education, the California Association of School Business Officers, and the Association of California School Administrators.

Response: As described above, these comments are persuasive and the regulations have been revised to expand the scope of the hearing to allow LEAs to contest the underlying compliance findings.

Comment: Stephen Rosenbaum of Protection and Advocacy, Inc. suggested that the hearing officer's qualifications should be specified, or the Special Education Hearing Office should conduct the hearings. The California School Boards Association made a related comment that hearing officers should be "neutral."

Response: Given the change in the scope of the hearing, it is likely that the hearings will be factually and legally more complex than originally anticipated. It therefore seems appropriate to ensure that the hearing officer is qualified to conduct such a hearing. The

regulation has been revised to require experience with special education and also with administrative hearing practice. In addition, the timelines for LEA response to the notice of hearing and the time to prepare for hearing have been lengthened. Further, the revised regulation gives the hearing officer discretion to grant continuances in appropriate circumstances. As to the neutrality of the hearing officer, the California Department of Education (CDE) believes that an appropriately qualified employee of this department, who was not involved in making the underlying noncompliance findings, is sufficiently neutral to provide a fair hearing on the merits of the controversy.

Comment: Protection and Advocacy, Inc. also suggested that the hearing should not be limited to one hour; that the hearings should be open to the public; and that an LEA should be required to notify its local community that it has received a notice of hearing.

Response: Given the expanded scope of the hearing, the provision limiting the hearing to one hour has been deleted. The revised regulation also states that the hearing shall be open to the public. Given the other changes that have been made, and the requirement of 20 USC §1416 (d)(2) and 34 CFR §300.197 (b) regarding an LEA's obligation to bring the pendency of the withholding action to the attention of the public, it is unnecessary to include a public notice requirement in the regulation.

COMMENTS RECEIVED DURING THE PERIOD THE 15-DAY NOTICE AND PROPOSED REGULATION TEXT WAS AVAILABLE TO THE PUBLIC

The modified text is made available to the public from May 19, 2004 through June 2, 2004.

ALTERNATIVES DETERMINATION

The State Board has determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

LOCAL MANDATE DETERMINATION

The proposed regulations (do/do not) impose any mandate on local agencies or school districts (to be determined by fiscal analysis before May Board Meeting).

3/29/04

Title 5. EDUCATION

Division 1. State Department of Education

Chapter 3. Handicapped Children

SUBCHAPTER 1. SPECIAL EDUCATION

Article 7. Procedural Safeguards

Add §§ 3088.1 and 3088.2 to read:

§ 3088.1. Sanctions: Withholding Funds to Enforce Special Education Compliance.

~~(a) Prior to withholding funds pursuant to subdivision (a) of Education Code Section 56845, the Superintendent shall provide a local education agency with a reasonable notice and an opportunity for a hearing as follows:~~

~~(1) The department shall send the agency a written notice by certified mail:~~

~~(A) Stating the intent to withhold funds for noncompliance;~~

~~(B) Describing the nature of the noncompliance, and the specific corrective action (or actions) that the agency must take by an exact date (or dates) to come into compliance;~~

~~(C) Summarizing efforts to verify that required corrective actions have not already been taken by the agency;~~

~~(D) Specifying the approximate amount of funds to be withheld and the anticipated timing of the withholding; and~~

~~(E) Advising the agency of the opportunity for a hearing prior to the withholding, and the date by which the agency must deliver to the department in writing a request for a hearing, which date may be no less than 20 calendar days after the notice is received by the agency.~~

~~(2) If an agency requests a hearing pursuant to subparagraph (E) of paragraph (1):~~

~~(A) The department shall schedule the hearing within 20 calendar days of the receipt of the request and shall notify the agency of the time and place of the hearing;~~

~~(B) A hearing officer shall be assigned by the department to conduct the hearing;~~

~~(C) An audiotape of the hearing shall be made;~~

~~(D) The time allotted for the hearing shall be one hour;~~

~~(E) Technical rules of evidence shall not apply at the hearing, but relevant written evidence or oral testimony may be submitted;~~

~~(F) Facts and arguments presented by the agency shall focus exclusively on what the agency has done to correct the noncompliance and/or whether mitigating factors have prevented the agency from initiating or completing corrective action(s);~~

~~(3) A hearing conducted pursuant to paragraph (2) shall not reopen any finding of noncompliance or any corrective action that has been ordered. The hearing officer's purpose shall be to determine whether the agency presents sufficient proof of corrective action (s) having been taken or of the presence of mitigating factors to justify either no withholding of funds or a modification of intended withholding of funds.~~

~~(b) If a hearing is held pursuant to subdivision (a), the hearing officer shall submit a recommendation to the Superintendent within 20 calendar days of the hearing's conclusion. Upon considering the hearing officer's recommendation, the Superintendent shall proceed with the withholding of funds (pursuant to the notice of intent), modify the amount and/or timing of the withholding of funds, or not withhold funds, and the affected local education agency shall be notified accordingly by the department.~~

~~(c) If a hearing is not held pursuant to subdivision (a), the withholding of funds shall take place pursuant to the written notice of intent delivered to the local education agency.~~

(a) When a district, special education local plan area, or county office of education fails to comply substantially with a provision of law regarding special education and related services, the superintendent may withhold funds allocated to such local agency under Chapter 7.2 (commencing with Section 56836) of Part 30 of the Education Code and the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.). Such

noncompliance may result from failure of the local agency to substantially comply with corrective action orders issued by the Department of Education in monitoring findings or complaint investigation reports. "Substantial noncompliance" means an incident of significant failure to provide a child with a disability with a free appropriate public education, a history of chronic noncompliance in a particular area, or a systemic agency-wide problem of noncompliance.

(b) Prior to withholding funds, the department shall provide written notice to the local educational agency, by certified mail, of the noncompliance findings that are the basis of the Department's intent to withhold funds. The notice shall also inform the local agency of the opportunity to request a hearing to contest the findings and the proposed withholding of funds.

(c) The notice shall include the following information:

(1) The specific past and existing noncompliance that is the basis of the withholding of funds.

(2) The efforts that have been made by the Department to verify that all required corrective actions have been taken.

(3) The specific actions that must be taken by the local educational agency to bring it into compliance by an exact date to avoid the withholding of funds.

(d) The local educational agency shall have 30 calendar days from the date of the notice to make a written request for a hearing. The department shall schedule a hearing within 30 days of receipt of a request for hearing, and notify the local agency of the time and place for hearing. A hearing officer with experience in special education and with administrative hearing procedures shall be assigned by the department to conduct the hearing and make an audio recording of the proceeding. The hearing officer may grant continuances of the date for hearing for good cause.

(e) The local education agency shall have the opportunity, prior to the hearing, to obtain all documentary evidence maintained by the Department's Special Education Division that supports the findings of noncompliance at issue in the notice of intent to withhold funds.

(f) Technical rules of evidence shall not apply to the hearing, but relevant written evidence or oral testimony may be submitted, as appropriate. Local education agencies may be represented by counsel and the hearings will be open to the public.

(g) If a hearing is not requested, the Department shall withhold funds as stated in the notice. If a hearing is held, a written decision shall be rendered within 30 calendar days from the date the hearing is held.

NOTE: Authority cited: Section ~~33031~~ 56100, Education Code. Reference: Section 56845(a), Education Code.

§ 3088.2. Enforcement and Withholding of Funds.

~~(a) If funds are withheld from a local education agency pursuant to subdivision (a) of Education Code Section 56845, the funds may subsequently be apportioned to the agency pursuant to subdivision (b) of Education Code Section 56845 upon the submission to the department of:~~

~~(a) A written request by the agency; and~~

~~(b) Evidence that the agency has met the condition for apportionment specified in subdivision (b) of Education Code Section 56845.~~

(a) The hearing officer shall determine, based on the totality of the evidence, whether a preponderance of the evidence supports the Department's findings of noncompliance and the determination that withholding of funds is appropriate in the particular circumstances of the case. The hearing officer's decision shall be the final decision of

the Department of Education.

(b) If the Superintendent of Public Instruction determines, subsequent to withholding funds, that a local educational agency has made substantial progress toward compliance with the state law, federal law, or regulations governing the provision of special education and related services to individuals with exceptional needs, the superintendent may apportion the state or federal funds previously withheld to the local educational agency.

NOTE: Authority cited: Section ~~33031~~ 56100, Education Code. Reference: Section 56845(b), Education Code.

03-29-04